

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

Kormahyah Karmue

v.

Civil No. 17-cv-107-LM-AKJ

David Remington, Chief Deputy
United States Marshal, et al.¹

REPORT AND RECOMMENDATION

Plaintiff, Kormahyah Karmue, has filed a Second Amended Complaint (Doc. No. 60-1) and an addendum thereto (Doc. No. 60), which are before the court for preliminary review, pursuant to 28 U.S.C. § 1915A(a). The Second Amended Complaint (Doc. No. 60-1), as addended by Document No. 60, is the operative complaint in this matter for all purposes.² Also before the

¹The court construes Karmue to have named the following defendants to this action, either in the caption or narrative of the Second Amended Complaint (Doc. No. 60-1): United States Marshals Service for the District of Rhode Island ("USMS-RI") Chief Deputy David Remington; USMS-RI Deputy Brenton Moore (formerly identified as John Doe #1), USMS-RI Deputy Elden DaSilva (formerly identified as John Doe #2), USMS-RI Justin Carvalho, USMS-RI Deputy John Doe #4; the Donald W. Wyatt Detention Center ("WDC"); WDC Warden Daniel W. Martin; WDC physician Dr. Edward Blanchette; the United States Marshals Service ("USMS"); the Federal Bureau of Prisons; the United States; Federal Medical Center Devens ("FMC-Devens") physician Dr. Danji, whose first name is unknown ("FNU"), and FMC-Devens Physical Therapist FNU Quinn.

²The court issued a Report and Recommendation (Doc. No. 44) on July 25, 2017, after conducting preliminary review of

court for consideration and a recommendation as to disposition are Karmue's requests for preliminary injunctive relief, contained in plaintiff's "Motion to Request Extension of Time to Object" (Doc. No. 48) and Second Amended Complaint (Doc. No. 60-1).

Preliminary Review

I. Standard

In determining whether a pro se pleading states a claim, the court construes the pleading liberally. See Erickson v. Pardus, 551 U.S. 89, 94 (2007). Disregarding any legal conclusions, the court considers whether the factual content in the pleading and inferences reasonably drawn therefrom, taken as true, state a facially plausible claim to relief. Hernandez-Cuevas v. Taylor, 723 F.3d 91, 102-03 (1st Cir. 2013) (citing Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009)).

Applying this standard, the court has construed the Second Amended Complaint to contain the background facts, and to assert claims, as set forth in this Report and Recommendation, for all

Karmue's First Amended Complaint (Doc. No. 11). The July 25, 2017 Report and Recommendation (Doc. No. 44) has been vacated as moot in an Order issued simultaneously with this Report and Recommendation.

purposes. To the extent plaintiff disagrees with the facts or claims as construed herein, he must do so by filing a timely objection to this Report and Recommendation, or a motion to amend his complaint.

II. Identification of John Doe Defendants

In Karmue's initial (Doc. No. 1) ("Complaint"), Karmue named three John Doe defendants, who he identified as John Does #1-#3. Karmue indicated in the caption of his Complaint that John Does #1 and #2 were agents of the United States Marshals Service for the District of Rhode Island ("USMS-RI"), and John Doe #3 was the Warden of the Donald W. Wyatt Detention Center in Central Falls, Rhode Island ("WDC"). In the Complaint, Karmue described John Doe #1 as a USMS-RI deputy who: drove the vehicle transporting Karmue from the WDC to the federal courthouse in Providence, Rhode Island, on April 23, 2015; and assaulted Karmue in an elevator inside the courthouse on that date. In the Complaint, Karmue described John Doe #2 as a USMS-RI deputy who: was in the passenger seat during Karmue's April 23, 2015 transport from the WDC to the courthouse; who refused Karmue's request to be restrained by a seatbelt; and who assaulted Karmue in an elevator inside the courthouse on that date.

In Karmue's First Amended Complaint (Doc. No. 11), Karmue continued to identify John Does #1-#3 as he did in his initial

complaint, but also added assertions against two additional unnamed USMS-RI deputies who were allegedly present in the elevator inside the courthouse on April 23, 2015, when John Does #1 and #2 assaulted Karmue. In the First Amended Complaint, Karmue further alleged that John Doe #2 accompanied Karmue in an ambulance that transported him from the federal courthouse to the Roger Williams Hospital ("RWH") on April 23, 2015, and was one of two USMS-RI deputies who were with Karmue at the RWH on that date.

The court conducted a preliminary review of the First Amended Complaint, and on July 25, 2017, issued a Report and Recommendation (Doc. No. 44) ("July 25 R&R").³ In the July 25 R&R, the court identified John Does #1-#4 as USMS-RI deputies, and referred to the WDC Warden by title, and not as a John Doe defendant. In the July 25 R&R, the court erroneously construed the complaint to allege that John Doe #1 was the second USMS-RI deputy present with John Doe #2 at the RWH on April 23, 2015. In the July 25 R&R, the court also identified John Does #3 and #4 as the two unnamed USMS-RI deputies who Karmue had alleged were present in the elevator when John Does #1 and #2 assaulted Karmue.

³The July 25 R&R has been vacated as moot in an endorsed order issued simultaneously with this Report and Recommendation.

In an Order (Doc. No. 45) issued simultaneously with the July 25 R&R, the court authorized individual capacity claims to proceed against the USMS-RI deputies it had identified as John Does #1-#4, and a separate claim to proceed against the WDC Warden in his official capacity.⁴ The court also directed the United States Attorney for the District of Rhode Island to file a notice either identifying John Does #1-#4 by name and providing service addresses for those defendants, or stating that those individuals could not be identified by name.

On September 18, 2017, Assistant United States Attorney ("AUSA") Bethany Wong filed a "Notice of the Identities of the Federal John Doe Defendants" (Doc. No. 53) ("September 18 Notice"). In the September 18 Notice, AUSA Wong, while disputing the facts asserted by Karmue, stated that: the USMS-RI deputy who drove the vehicle in which Karmue was transported from the WDC to the courthouse on April 23, 2015, and who was present with Karmue in the courthouse elevator on that date, was Brenton Moore; the second USMS-RI deputy participating in the April 23, 2015 transport, who was present with Karmue in the courthouse elevator on that date, and who accompanied Karmue in

⁴On August 21, 2017, the WDC Warden, through counsel, filed a motion to dismiss the claim asserted against him, see Doc. No. 52, identifying the WDC Warden as Daniel W. Martin.

the ambulance from the courthouse to the RWH on that date, was Elden DaSilva; and that a USMS-RI deputy who was present with Karmue in the courthouse elevator on April 23, 2015, and who also was present at the RWH with Karmue on that date, was Justin Carvalho. AUSA Wong was not able to identify John Doe #4 by name. AUSA Wong indicated that her office is authorized to accept service on behalf of USMS-RI Deputies Moore, DaSilva, and Carvalho.

Based on the entirety of the information before it at this time, the court, in this Report and Recommendation, and for all purposes going forward in this action:

- identifies the WDC Warden as Daniel W. Martin, and not as a John Doe defendant;
- substitutes USMS-RI Deputy Brenton Moore for the defendant the court previously identified as John Doe #1 (except to the extent the court erroneously construed the complaint as alleging that John Doe #1 was present with Karmue at the RWH on April 23, 2015);
- substitutes USMS-RI Deputy Elden DaSilva for the defendant the court previously identified as John Doe #2;
- substitutes USMS-RI Deputy Justin Carvalho for one of the two USMS-RI deputies Karmue alleges was present in the elevator inside the courthouse with Karmue, Moore, and

DaSilva, and construes the complaint to allege that Carvalho was the second USMS-RI deputy present at the RWH with Karmue and DaSilva on April 23, 2015; and

- clarifies that the court is using the identifier, John Doe #4, to refer to the fourth USMS-RI deputy Karmue alleges was present in the courthouse elevator with Karmue, Moore, DaSilva, and Carvalho, on April 23, 2015.

III. Background

On April 23, 2015, Karmue was a federal pretrial detainee at the WDC. On that date, two USMS-RI Deputies, Brenton Moore and Elden DaSilva, transported Karmue from the WDC to the federal courthouse for a scheduled pretrial hearing in Karmue's criminal case, United States v. Kerkula, No. 13-cr-179-WES-PAS-3 (D.R.I.).

Moore and DaSilva placed Karmue, handcuffed and in leg irons, in the rear seat of the van, behind a steel partition. Prior to leaving the WDC, Karmue asked DaSilva to fasten Karmue's seatbelt, but DaSilva ignored the request. Moore drove the transport van, and DaSilva rode in the passenger seat.

En route to the courthouse, Moore, who Karmue alleges was driving over the speed limit, braked suddenly to avoid a collision. Karmue states that, because he was handcuffed, shackled, and not seatbelted, when the van came to an abrupt

stop, his body hit the steel partition separating him from the driver's compartment, and he fell to the floor of the van. Karmue claims that as a result, he sustained injuries to his neck, back, legs, and hips.

Moore continued to drive to the courthouse. During that drive, Karmue alleges he made repeated requests for medical assistance, which Moore and DaSilva ignored. Karmue asserts that at the courthouse, those deputies "dragged" him out of the van, into the courthouse, through hallways, into an elevator, and into a holding cell, where they left him, handcuffed and shackled.

Approximately ten minutes later, Moore and DaSilva returned to the holding cell, accompanied by two Emergency Medical Technicians ("EMTs") with a stretcher. Karmue alleges that as they approached the holding cell, Moore told the EMTs that Karmue was faking his injuries and not to touch Karmue. Karmue states that Moore and DaSilva then dragged Karmue down the hall and into an elevator. Also in the elevator were the two EMTs, and two additional USMS-RI Deputies: Justin Carvalho, and an unnamed USMS-RI deputy, whom the court has identified as John Doe #4.

Once in the elevator, Karmue states that Moore and DaSilva let go of Karmue, and became angry when Karmue, who asserts that

he was unable to stand, fell to the ground. Karmue alleges that Moore and DaSilva then proceeded to kick and punch Karmue while he was on the floor. Karmue alleges that during the assault, Moore used a Taser or stun gun on Karmue three times, once striking Karmue's left eye with the Taser or stun gun, blurring Karmue's vision. Karmue claims that none of the other individuals in the elevator attempted to stop the assault.

When the elevator stopped, Karmue was taken to a waiting ambulance, where he was placed on a stretcher for transport to the hospital. DaSilva accompanied Karmue in the ambulance. Karmue claims that in the ambulance, an EMT attempted to provide Karmue with medical assistance but stopped because DaSilva directed the EMT not to administer treatment to Karmue, and then "mocked and threatened" Karmue.

The ambulance delivered Karmue to the emergency room of the Roger Williams Hospital ("RWH"). At the RWH, Karmue asserts that DaSilva and Carvalho were present, and interrupted Karmue's efforts to answer the RWH staff members' questions, saying that Karmue was making up his injuries and pain. DaSilva and Carvalho also spoke to a doctor outside of Karmue's room before the doctor saw Karmue. The doctor did not provide Karmue with any treatment, and told the RWH medical staff that Karmue was being transferred elsewhere for treatment.

Karmue was transported from the RWH to the WDC, where he was placed in an observation cell and monitored overnight by a WDC officer. At some point that evening, Karmue states that a WDC physician, Dr. Edward Blanchette, accused Karmue of malingering and denied him all medical care.

Karmue alleges that his condition deteriorated, and on the morning of April 24, 2015, Karmue was transported by ambulance from the WDC to Memorial Hospital ("Memorial"). At Memorial, Karmue had a CT scan and was seen by a doctor who looked at Karmue's left eye, and told Karmue that, other than Karmue's claim of blurred vision, his eye seemed okay. Karmue states that the doctor told him that if his vision continued to deteriorate, he should follow up with a specialist.

Karmue was then sent back to the WDC, placed in the medical clinic, and monitored by an officer. Karmue states that while in the WDC medical clinic, he made a number of requests for medical care which were ignored or refused by the WDC medical staff. Karmue asserts that Dr. Blanchette repeatedly told him to "be quiet," and instructed WDC medical staff members not to provide him with any medical treatment or assistance. Karmue asserts that WDC medical staff members repeatedly took away a wheelchair with which he had been provided, in an attempt to prove that Karmue was faking his injuries.

Karmue alleges that because he filed numerous complaints at the WDC concerning his lack of medical care, he was transferred from the WDC medical clinic to the WDC Special Housing Unit ("SHU"). Karmue alleges that when he continued to make requests for medical care, a SHU staff member threatened to place Karmue in worse conditions. When no attention or concern was paid to his complaints and requests for medical care, Karmue states that he slowed his requests and was returned to the WDC medical clinic.

At some point after his August 2015 sentencing, Karmue was transferred to the Federal Medical Center Devens ("FMC-Devens") in Massachusetts.⁵ Karmue remains incarcerated at FMC-Devens where, he alleges, he has continued to have difficulty receiving adequate medical care. In particular, Karmue states that Dr. Danji and Physical Therapist Quinn have refused to provide him with treatment for his injuries and pain, and have denied him access to necessary medical assistive devices, claiming that Karmue is either faking his injuries or not complying with

⁵The record in this case does not show when Karmue was transferred to FMC-Devens. Karmue was still at WDC at the time of his August 26, 2015 sentencing, where he remained for some period of time after he was sentenced. See Sept. 3, 2015 Karmue Letter, United States v. Kerkula, No. 1:13-cr-00179-WES-PAS-3 (D.R.I.) (ECF No. 216, filed Sept. 15, 2015) (indicating Karmue's return address as WDC).

treatment recommendations. Because he has not received adequate treatment, Karmue alleges he has had continuous and increasing pain during his incarceration at FMC-Devens.

IV. Claims

Construed liberally, Karmue's Second Amended Complaint and its addendum (Doc. Nos. 60, 60-1), comprising the operative complaint at this time, assert the following claims:

1. USMS-RI Deputies Brenton Moore and Elden DaSilva violated Karmue's Fifth Amendment due process right to be protected from a substantial risk of serious harm while in pretrial detention by failing to properly secure Karmue with a seatbelt while transporting Karmue from the WDC to the federal courthouse on April 23, 2015.
2. USMS-RI Deputies Brenton Moore and Elden DaSilva violated Karmue's Fifth Amendment due process rights, in that they kicked and punched him while he was on the floor, and used a Taser or stun-gun on him, in a manner that was objectively unreasonable, in an elevator in the courthouse on April 23, 2015.
3. USMS-RI Deputies Justin Carvalho and John Doe #4 violated Karmue's Fifth Amendment due process rights when they failed to intervene to protect Karmue from being assaulted in a manner that was objectively unreasonable by USMS-RI Deputies Brenton Moore and Elden DaSilva on April 23, 2015, despite having the ability and opportunity to do so.
4. USMS-RI Deputies Brenton Moore, Elden DaSilva, and Justin Carvalho violated Karmue's Fifth Amendment due process right to adequate medical care on April 23, 2015, when:
 - a. Moore and DaSilva denied Karmue's repeated requests for medical assistance and evaluation for his knees and hips after he was injured during transport;

- b. Moore and DaSilva stopped EMTs from medically evaluating and/or treating Karmue in a holding cell at the courthouse;
 - c. DaSilva stopped EMTs from medically evaluating and/or treating Karmue in an ambulance transporting Karmue from the courthouse to RWH; and
 - d. DaSilva and Carvalho stopped medical personnel at RWH from medically examining and/or treating Karmue in the RWH emergency room.
5. WDC Physician Edward Blanchette violated Karmue's Fifth and/or Fourteenth Amendment rights to adequate medical care during Karmue's pretrial detention, and Karmue's Eighth Amendment rights after Karmue was sentenced, when Dr. Blanchette:
- a. denied Karmue adequate medical evaluation and treatment for injuries to his knees, hips, and left eye;
 - b. caused Karmue to be denied necessary prescription medication and assistive medical devices; and
 - c. improperly instructed WDC medical staff not to provide Karmue with any medical care.
6. WDC Physician Edward Blanchette engaged in medical malpractice and negligence, with respect to the events alleged in Claim 5(a)-(c):
- a. giving rise to Dr. Blanchette's liability under Rhode Island tort law; and
 - b. causing the WDC, as the employer of Dr. Edward Blanchette, to be vicariously liable under Rhode Island law for Dr. Blanchette's negligence.
7. One or more unnamed WDC officers violated Karmue's Fifth and/or Fourteenth Amendment right not to be subjected to punishment during pretrial confinement, or his Eighth Amendment right to avoid cruel and unusual punishment after sentencing, by forcing him to sleep in a top bunk with knowledge that such a bed assignment would cause Karmue

pain due to his physical limitations occasioned by his medical conditions.

8. One or more unnamed WDC officers violated Karmue's First Amendment right to petition the government for a redress of grievances when, in retaliation for Karmue's repeated requests for medical care and complaints about the inadequacy of his medical care, those officers caused Karmue to be transferred from the WDC medical clinic to SHU and then threatened to house Karmue in conditions worse than those in SHU.

9. The United States of America is liable to Karmue under the Federal Tort Claims Act ("FTCA") for the negligence and other tortious acts underlying Claims 1-7 above, to the extent those acts were committed by federal employees acting in the scope of their employment.

10. Karmue has suffered violations of his Eighth Amendment right to adequate medical care, in that FMC-Devens physician Dr. Danji and Physical Therapist Quinn, acting with deliberate indifference to Karmue's serious medical needs, denied Karmue adequate medical care.

11. Karmue has been subjected to medical negligence at FMC-Devens, rendering the United States liable to Karmue under the FTCA for the negligence and other tortious acts of Dr. Danji and Physical Therapist Quinn, to the extent Dr. Danji and Physical Therapist Quinn were federal employees acting in the scope of their employment.

V. Discussion

A. Source of Law for Claims in Pretrial Period

Karmue asserts that all of his claims alleging inadequate medical care, excessive force, and failure to protect, arise under the Eighth Amendment. The Eighth Amendment, however, protects convicted prisoners from cruel and unusual punishment, and thus provides grounds only for Karmue's claims arising after

he was convicted. See Whitley v. Albers, 475 U.S. 312, 318 (1986). Karmue's claims of constitutional violations arising when he was in pretrial confinement are due process claims, see Surprenant v. Rivas, 424 F.3d 5, 18 (1st Cir. 2005). The references to the Eighth Amendment in the Second Amended Complaint, relating to pretrial matters, are surplusage. Those claims arise under the Due Process Clause of the Fifth or Fourteenth Amendment, depending on whether defendants are state or federal actors, and the court in listing those claims has substituted those sources of law for the Eighth Amendment as appropriate.

B. Claims that May Proceed (Claims 1-6, 9-11)

Karmue's claims, numbered above as Claims 1-6 and 9-11, may proceed at this time. In an Order issued simultaneously with this Report and Recommendation, the court directs that the defendants to those claims be served, if they have not already been served in this matter, and further directs defendants to answer or otherwise respond to those claims.

C. Top Bunk Assignment (Claim 7)

Karmue has alleged that he was assigned a top bunk for some period of time while at WDC, and that using the top bunk caused him pain, as his medical problems made it difficult for him to get in and out of a top bunk. Karmue has failed to name any

individual defendant who, acting with a mens rea that was not simply negligent, denied Karmue access to a bottom bunk. Cf. Kingsley v. Hendrickson, 135 S. Ct. 2466, 2472 (2015) (“[L]iability for negligently inflicted harm is categorically beneath the threshold of constitutional due process.” (citation omitted)); Mosher v. Nelson, 589 F.3d 488, 494 (1st Cir. 2009) (“‘mere negligence’” is insufficient to support Eighth Amendment claim (citation omitted)). Accordingly, Karmue has failed to state a claim that any defendant violated his constitutional right not to subjected to punitive conditions of confinement while in pretrial detention, or to cruel and unusual punishment after sentencing, by assigning him to a top bunk. The district judge should therefore dismiss Karmue’s claim concerning his top bunk assignment at the WDC, identified above as Claim 7.

D. Retaliation at WDC (Claim 8)

In Karmue’s First Amended Complaint (Doc. No. 11), Karmue asserted the same retaliation claims concerning his transfer to SHU at the WDC that he has now asserted in his Second Amended Complaint (Doc. No. 60-1), and which are set forth above in Claim 8. After Karmue filed his First Amended Complaint, the court directed him to amend his complaint to identify specific defendants to his retaliation claims. Karmue has failed to do

so. The district judge, therefore, should dismiss Claim 8 because of Karmue's failure to name any defendant to that claim.

E. David Remington

Karmue has named USMS-RI Chief Deputy David Remington as a defendant to this action, alleging that John Doe #4 could have been Remington, without pleading any non-conclusory facts that if taken as true would demonstrate that Remington is properly so-identified. The allegations in the Second Amended Complaint concerning John Doe #4's identity are too speculative at this time to support any claim upon which relief can be granted against Remington arising out of John Doe #4's conduct. Accordingly, the district judge should dismiss Karmue's claims against Remington, and drop Remington from this action, without prejudice to Karmue's ability to move to amend the complaint to plead facts to support a claim against Remington upon which relief might be granted in this action.

F. USMS and the BOP

Karmue has named the United States Marshals Service ("USMS") and the Federal Bureau of Prisons ("BOP") as defendants to this action. Federal agencies such as the USMS and the BOP, however, may not be sued for constitutional torts such as those of which Karmue complains here, as they are protected by sovereign immunity. See Caldwell v. Klinker, 646 F. App'x 842,

845 (11th Cir. 2016) (citing FDIC v. Meyer, 510 U.S. 471, 475 (1994)). To the extent Karmue has asserted tort claims under state law in this action, those claims arise under the FTCA, and are actionable only against the United States. Accordingly, the district judge should dismiss Karmue's claims asserted against the USMS and the BOP, and drop those defendants from this action.

Preliminary Injunctive Relief

In his motion to extend (Doc. No. 48) and Second Amended Complaint (Doc. No. 60-1), Karmue seeks, among other things, an injunction prohibiting FMC-Devens staff members from: retaliating against Karmue for repeatedly requesting medical treatment, denying Karmue proper medical evaluation and treatment, and denying Karmue a bottom bunk pass. Karmue also asks the court to enjoin the defendants from transferring him out of FMC-Devens without his express consent, or otherwise retaliating against him, during the pendency of this action. The federal defendants who have appeared, have filed an objection to that request. See Doc. No. 65. In the Order issued simultaneously with this Report and Recommendation, all defendants are granted leave to file a response or supplemental

response, as appropriate, to Karmue's request for preliminary injunctive relief.

Conclusion

For the foregoing reasons, the district judge should dismiss the claims identified in this Report and Recommendation as Claims 7 and 8, and drop defendants Remington, the USMS, and the BOP from this action. Any objections to this Report and Recommendation must be filed within fourteen days of receipt of this notice. See Fed. R. Civ. P. 72(b)(2). The fourteen-day period may be extended upon motion. Failure to file specific written objections to the Report and Recommendation within the specified time waives the right to appeal the district court's order. See Santos-Santos v. Torres-Centeno, 842 F.3d 163, 168 (1st Cir. 2016).



Andrea K. Johnstone
United States Magistrate Judge
Sitting by Designation

May 18, 2018

cc: Kormahyah Karmue, pro se
Bethany N. Wong, Esq.
Matthew C. Reeber, Esq.